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# Death Penalty: A Human Rights Issue for South Africa

Chris Jones

## Abstract

In South Africa, the death penalty has been repealed just after the arrival of democracy in 1994. At present, due to numerous daily murders, especially farm murders, this issue is being debated once again seriously – by ordinary citizens, politicians, theologians, and others. In the media, in particular, it gets a lot of attention and in view of the extent of violent crime in our country, the reinstatement of the death penalty is again supported by many. The death penalty as such will always be contentious because it is about the reasoned termination of someone's life – which is a radical act. Between 2009 and 2013 I did research on the death penalty in South African prisons (the first of its kind as far as we could determine), in all 9 of our country's provinces. The content of this study, gathered from 467 convicted murderers, and several other core aspects of why the reinstatement of the death penalty particularly in South Africa, should not be an option, will be discussed with reference to supporting international and authoritative research.

**Keywords:** death penalty, (effective) deterrence, convicted murderers, restorative justice, South Africa

## 1. Introduction

From 2009 to 2013 I did research on the death penalty among convicted murderers in South African prisons<sup>1</sup>. The reason? There were so many South Africans who believed that the number of murders in our country would drastically decrease if the death penalty were reinstated. 467 convicted murderers in 18 prisons (urban and rural) in all 9 provinces of our country, located by the South African Department of Correctional Services (DCS), completed a questionnaire, approved by this department. 392 men and 75 women were interviewed before completing their questionnaires. The latter consisted of questions regarding general information such as age, race group, gender, and length of sentence. The first question focussed on: (1.a.1) What was your motive for committing murder (jealousy, spite, anger, thoughtlessness, money, or anything else - that had to be indicated)? (1.a.2) Were you exposed to violence shortly before committing murder (electronic media, or any other type of violence – that had to be indicated)? (1.b) Which of the following contributing factors played a role in the commitment of the murder (drugs, alcohol, or both)? (1.c) Was the murder premeditated or committed impulsively? The second question focussed on: (2.a) Do you think capital punishment would be a deterrent

<sup>1</sup> Jones, C. 2013. *Capital Punishment: Convicted murderers' views in 18 South African prisons, 2009–2013*. Unpublished research document. Stellenbosch University. Stellenbosch [1].

to committing serious crimes? (2.b) And in your specific case: Do you think capital punishment would have been a deterrent to committing murder? Question three (3) asked: Was the victim known to you? By name, sight, or not at all? Question four was interested in: (4.a) Are you currently involved in a rehabilitation program. And (4.b): If you are currently involved in a rehabilitation program, do you think this program is helpful, and if yes, in which ways? The last question (5) focussed on: Will you murder again? In jail or after you have been released?

All the information was accurately interpreted, and the results are discussed in the next section. This is followed by a brief discussion of South Africa's history regarding the death penalty. Thereafter relevant, supportive, and authoritative international research of why the death penalty should not be an option, is discussed. The article ends with some very brief remarks on South Africa's criminal justice system, the importance of restorative justice, and the death penalty as an important human rights issue not only for South Africa, but globally.

## **2. Research findings**

The data gained from this research met the necessary ethical standards. The respondents were well informed about the purpose of the research and their confidentiality, privacy and anonymity were guaranteed. They were fairly selected by the DCS, informed about how the research results would be disseminated, and they provided consent not only to participate, but also for the data to be used for this study.

### **2.1 Men**

15 of these participating men were under the age of 15 years; 206 between 15 and 29 years; 117 between 30 and 40 years and 54 older than 40 years. 193 were black; 168 Coloured; 22 white and 9 Indian.

Among the motives put forward for the murders committed, 5.9% of persons indicated jealousy; 4% spite; 41.7% anger; 13.4% thoughtlessness and 16.4% money. 18.6% did so for reasons other than those mentioned.

17.9% indicated that they had been exposed to violence in the media shortly before the murder; 2.8% were exposed to serious assault; 4.3% to gang violence; 7.9% to (other) violence within the community; 2.8% to domestic violence, and 12.8% to other forms of violence. 47.2% were not exposed to any violence before the murder

The following contributing factors played a role in the murders: 8.9% of people were under the influence of drugs; 41.6% under the influence of alcohol and 20.1% under the influence of both. 29.3% were sober.

19.1% of men planned the murder in advance, while 80.9% committed it impulsively. Four men indicated that they would commit murder again, depending on the circumstances. Among the reasons why the rest will not commit murder again are: I have discovered how high the value of life is and that every human being has the right to life and human dignity; murder is an inhuman act; it's bad in prison; I want to be free; it was a huge mistake; crime does not pay; it's no solution to problems; it causes tremendous emotional pain for everyone involved; I do not want to disappoint my family again; I am not in my inner nature a murderer; children must grow up with the presence and guidance of a father; restorative justice helped me find myself as well as with reconciliation with my family and the victim; God changed my life; it is a guilt that you carry with you for the rest of your life; I will

talk about my problems in the future; I learned to respect the law; one throws away ones future.

56.4% of the victims were known by name to the murderer and 9.1% indicated that he has seen the person before. 34.5% were completely unknown to the murderer.

315 of these men were engaged in a rehabilitation program of which 96.8% testified that it was valuable to them at that time. 5.3% of these murderers did not undergo any schooling; 80.7% did not complete their schooling; and 14% passed matric.

## **2.2 Women**

Of the 75 women who were interviewed and completed the questionnaire, four were younger than 15 years; 28 between 15 and 29 years; 24 between 30 and 40 years and 19 older than 40. 43 were black; 26 Coloured; 6 white and no Indian.

3.5% of women cited jealousy as the motive for their murder; 2.3% spite; 43% anger; 12.8% thoughtlessness; 17.4% money and 20.9% other motives.

12.7% experienced violence in the media shortly before they committed the murder; 7.6% were exposed to serious assault; 1.3% to violence in the community; no one experienced gang-related violence; 16.5% domestic violence; 5.1% experienced other forms of violence and 55.7% did not experience any form of violence before they committed the murder.

5.3% indicated that they committed the murder under the influence of drugs; 37.3% under the influence of alcohol and in 10.7% of women both these drugs played a role as contributing factors to the murder. 46.7% were not under the "influence" at all.

18.3% planned the murder in advance and 81.7% committed it impulsively. None of these women indicated that they would commit murder again. Some of the reasons they gave for this are: I learned new ways to master difficult circumstances; frightening experience; I met God; I am not inherently a bad person; I never want to end up in prison again; I hurt the people closest to me terribly; I'm very sorry; no one deserves to be hurt like that; such an act follows you for the rest of your life; crime does not pay; I am much wiser now; I will contact a family member, social worker or police member to help me if I find myself in such a situation again.

72% of the victims were known by name to the murderer and 13.3% by sight. 14.7% were completely unknown to the murderer.

58 of these women were engaged in a rehabilitation program and it was valuable to 89.7% at that time. 7.6% of these women had no schooling; 78.8% did not complete their schooling, while 13.6% passed matric.

## **2.3 Main findings (referred to only – not discussed)**

In the light of this research, which also included many personal conversations with prisoners, I am convinced that the reinstatement of the death penalty in South Africa will not reduce murders (significantly). Of course, every murder is one too many. About 70% of men and 54% of women commit murder under the influence of alcohol and/or drugs. They are therefore not liable for their actions. One of the prisoners put it this way: "The death penalty will not help, because drugs and alcohol make you lose control over your life. When you are under 'influence' or addicted you do not care about anything or think clearly" [1]. Furthermore, 80.9% of men and 81.7% of women committed murder on the spur of the moment, without clearly planning it ahead and thinking about the consequences.

Rehabilitation programs are valuable. Many people are products of broken families and communities. The moment they are exposed to value-driven rehabilitation programs, their behaviour begins to change. People can heal. There is a saying among prisoners that goes: “Liberate yourself through education [in prison] and you will be liberated long before you are released from prison” [1].

There must be a shift away from punitive justice to restorative justice (which does not deny punishment – see concluding remarks).

Programs with the view to release, as well as support by the community and the DCS after release, are essential. Much more can be done in this regard.

The further one progresses in school, the smaller the chance of getting involved in crime. Children should be encouraged and helped as much as possible to complete their schooling and further equip themselves. “The lower group of dysfunctional schools produces the highest percentage of criminals” [1] one of the murderers said.

Something will have to be done about alcohol and substance abuse, (such as the National Drug Master Plan<sup>2</sup> recently launched (26/06/2020) by Minister Lindiwe Zulu – Department of Social Development) and anger (such as the structured programmes by psychological services<sup>3</sup> in the DCS for inmates as well as their families). The causes of violence, crime, poverty, and hopelessness will have to be addressed better in a holistic way.

65.5% men and 85.3% women knew their victim by name or have seen him/her before. It is the so called “social fabric crimes” and has primarily to do with a lack of moral values as well as assets for healthy development.

The fact that 99% of men and 100% of women have indicated that they will not commit murder again indicates that they have learned important lessons. Many of these murderers are inherently not bad people.

The role of faith communities in rebuilding prisoners’ lives should not be underestimated.

Severe psychiatric cases must be permanently removed from society. These people are dangerous.

76.6% of the convicted murderers who participated in the abovementioned research were convinced that the death penalty would not have deterred them from committing murder. Of the remaining 23.4%, a huge number tended to think so too, but they were reluctant to indicate it with certainty.

### **3. Discussion – why South Africa should not consider reinstating the death penalty**

#### **3.1 Brief history**

This session begins with a brief reference to the history of the death penalty in South Africa. Until the use of the death penalty was suspended in February 1990, our country had “one of the highest records of judicial executions in the world” [4, 5]. Just over the period 1979–1989 “the annual total of executions exceeded 100 in every year except for 1983” [4]. Professor Cora Hoexter (1990) confirmed the extremely high number of people executed in South Africa by stating that “[i]n 1987, for example, hangings averaged almost one every two days” [6]. Judge Dennis Davis (1990) said that “[a]llegations of racial bias in sentencing practices in capital cases have been made, most prominently by the late Prof. Barend van

<sup>2</sup> For more information see [2].

<sup>3</sup> For more information see [3].



Niekerk, whose research suggested that black defendants stand a greater chance than white defendants of receiving the death penalty, particularly when the victim is white” [4]. Davis continued by saying that although Prof. van Niekerk “has been criticized for being unscientific, differences in capital sentences between the races continue to exist and are difficult to explain” [4]. There was also

*evidence to show that there are significant differences in sentencing practices of different judges. A retired Supreme Court judge and a retired magistrate have both confirmed recently that judges do have different philosophies regarding punishment and that some judges go out of their way to find reasons which will allow them to impose a punishment other than death. [4]*

Davis argued that once sentenced to death “a person is imprisoned on ‘death row’. The rigid conditions on death row and the fact that all prisoners there are waiting to be executed creates a traumatic, terrifying environment which causes terrible anguish and pain” [4]. A penal system such as this “which has been described as a ‘factory which produces corpses’, is arguably one which creates conditions of inhuman punishment” [4]. Davis concluded his thoughts on capital punishment by saying that “the execution itself is a barbaric event” [4] and referred to the late South African cardiac surgeon Prof. Chris Barnard<sup>4</sup> who described execution as follows:

*The man’s spiral cord will rupture at the point where it enters the skull, electro-chemical discharges will send his limbs flailing in a grotesque dance, eyes and tongues will start from the facial apertures under the assault of the rope and his bowels and bladder may simultaneously void themselves to soil the legs and drip onto the floor. [4]*

Davis quoted in this regard the then report on the death penalty by Amnesty International which argued “that the death penalty, like torture, constitutes an extreme physical and mental assault on a person who has already been made helpless by government authority” [4].

### 3.2 Current debate

Fortunately, with the dawn of democracy in South Africa (1994), the death penalty was abolished on 6 June 1995 by the Constitutional Court. “The court ruled that capital punishment, as provided for under the [then] Criminal Procedure Act, was in conflict with the country’s 1994 constitution” [5].

At present, seven years after the abovementioned research has been completed, there are still serious pleas in South Africa that the death penalty must be reinstated, because the cases of so many brutal and senseless murders leave many people speechless. Anton van Niekerk, distinguished professor of philosophy at Stellenbosch University, gives three reasons why the reinstatement of the death penalty should be avoided in South Africa [8]. The first is a pragmatic argument. According to him, enough studies have been done that show that the death penalty does not deter potential murderers (and rapists). The second is a political argument. South Africa is too complex and politicised to reinstate the death penalty. We know that the Constitutional Court interprets the death penalty as a violation of the most fundamental right, namely the right to life [9]. Before the 1990s, when the death

<sup>4</sup> He performed the world’s first human-to-human heart transplant operation and the first one in which the patient regained consciousness. For more information see [7].

penalty was still enforced in South Africa, more than 90% of those executed were black. It does not help to argue that the latter merely reflects the population composition in South Africa. The death penalty in South Africa, especially the memories of the time before the 1990s, is political dynamite [8]. The third and (probably) strongest argument is a moral one. We cannot morally justify incorporating the worst form of retribution, namely an eye for an eye, in our already “inadequate toolbox for conflict management”. This will only make conflict management more difficult than it already is [8].

Linked to this is the question how we as a South African society see ourselves and how we want to think about ourselves. According to van Niekerk, one can argue, as the philosopher Immanuel Kant, who “exemplifies a pure retributivism about capital punishment: murderers must die for their offense, social consequences are wholly irrelevant, and the basis for linking the death penalty to the crime is ‘the Law of Retribution,’ the ancient maxim”, the law of retaliation (an eye for an eye), “rooted in ‘the principle of equality’” [10]. However, this argument is not convincing. The respect we have for all people implies that we as a society must continue to refuse to descend to the level of the murderer as well as the brutality that accompanies this act. We do not owe the murderer much, according to Van Niekerk, but we owe ourselves under the worst provocation, the preservation of humanity, morality and spiritual preparedness and resilience - the freedom to never allow the insanity of the murderer to become prescriptive for how we act towards him (or her) and others [8].

Judge Johann van der Westhuizen, former judge of the South African Constitutional Court, confirms that the death penalty does not deter potential murderers from committing murder. No statistics prove that the death penalty is an effective deterrent. He argues that, although retribution is one purpose of punishment, we do not steal from thieves, we do not rob robbers, and we do not rape rapists. Why then kill murderers? [11]. He then asks: what does the death penalty do to a community’s view of violence and death? Should the state act at the level of the criminal? Is killing an acceptable solution - almost like war for peace or sex for virginity? Blunt communities accept the death penalty as part of their life. In South Africa, on average, more than 50 murders take place per day, but fortunately our constitution prevents us from executing these people. Van der Westhuizen continues to say that murders in South Africa are not racially motivated, as some (many?) people believe. Farm and house murders are sometimes horribly cruel but according to him he has never encountered a clear racial motive in court. For him, murderers kill mostly out of greed, jealousy, passion, and during gang wars. Also because of poverty and the despondency and drunkenness that accompany it, but not because of racial hatred [11].

Currently Amnesty International unequivocally states that “the death penalty is the ultimate cruel, inhuman and degrading punishment” [12]. Amnesty “opposes the death penalty in all cases without exception - regardless of who is accused, the nature or circumstances of the crime, guilt or innocence or method of execution” [12]. It further holds “that the death penalty breaches human rights, in particular the right to life and the right to live free from torture or cruel, inhuman or degrading treatment or punishment” [12]. Both these rights are protected in the Universal Declaration of Human Rights, adopted by the UN in 1948<sup>5</sup> [13].

According to Amnesty International “[t]he death penalty is a symptom of a culture of violence, not a solution to it” [12]. It provides the following five reasons why the death penalty should be abolished (and which should also apply

<sup>5</sup> See: United Nations. Universal Declaration of Human Rights, in particular articles 3 and 5 [13].

to South Africa). The first (1) has to do with the fact that it is irreversible, and mistakes happen:

*Execution is the ultimate, irrevocable punishment: the risk of executing an innocent person can never be eliminated. Since 1973, for example, more than 160 prisoners sent to death row in the USA have later been exonerated or released from death row on grounds of innocence. Others have been executed despite serious doubts about their guilt. [12]*

Secondly (2) it says that the death penalty does not deter crime: “Countries who execute commonly cite the death penalty as a way to deter people from committing crime. This claim has been repeatedly discredited, and there is no evidence that the death penalty is any more effective in reducing crime than life imprisonment” [12].

Thirdly (3) it states that the death penalty is often used within skewed justice systems:

*In many cases recorded by Amnesty International, people were executed after being convicted in grossly unfair trials, on the basis of torture-tainted evidence and with inadequate legal representation. In some countries, death sentences are imposed as the mandatory punishment for certain offences, meaning that judges are not able to consider the circumstances of the crime or of the defendant before sentencing. [12]*

Fourthly (4), the death penalty is discriminatory: “The weight of the death penalty is disproportionately carried by those with less advantaged socio-economic backgrounds or belonging to a racial, ethnic or religious minority. This includes having limited access to legal representation, for example, or being at greater disadvantage in their experience of the criminal justice system” [12].

Fifthly (5), it is used as a political tool. “The authorities in some countries, for example Iran and Sudan, use the death penalty to punish political opponents” [12].

According to Amnesty, people are executed daily and “sentenced to death by the state as punishment for a variety of crimes – sometimes for acts that should not be criminalized. In some countries, it can be for drug-related offences, in others it is reserved for terrorism-related acts and murder” [12]. In some countries people under the age of 18 are executed,<sup>6</sup>

*others use the death penalty against people with mental and intellectual disabilities and several others apply the death penalty after unfair trials – in clear violation of international law and standards. People can spend years on death row, not knowing when their time is up, or whether they will see their families one last time. [12]*

When Amnesty International “started its work in 1977, only 16 countries had totally abolished the death penalty” [12]. By the end of 2019 “that number has risen to 106” [12]. Furthermore, “at least 657 executions [were recorded] in 20 countries in 2019, down by 5% from 2018 (at least 690 executions). This figure represents the lowest number of executions that Amnesty International has recorded in at least a decade” [12]. It further states that “1 000s of people were likely executed in China, but the numbers remain classified” [12]. If China is excluded, “86% of all reported executions took place in just four countries – Iran, Saudi Arabia, Iraq and Egypt” [12]. With regards to death sentences per year, “Amnesty International recorded at least 2,307 death sentences in 56 countries in 2019, a slight decrease from the total of 2,531 reported in 2018. At least 26,604 people were known to be under sentence

<sup>6</sup> To read more about juvenile execution, see [14].



of death globally at the end of 2019” [12]. This is morally unacceptable, and several instruments have been adopted internationally, banning the use of the death penalty. They are:

- The Second Optional Protocol to the International Covenant on Civil and Political Rights, aiming at the abolition of the death penalty [15].
- Protocol No. 6 to the European Convention on Human Rights, concerning the abolition of the death penalty [16], and Protocol No. 13 to the European Convention on Human Rights, concerning the abolition of the death penalty in all circumstances [17].
- The Protocol to the American Convention on Human Rights to Abolish the Death Penalty [18].

Back to the South African context. It is in the light of so many farm murders (as referred to earlier) and violent crime in South Africa that there is currently a strong plea from various quarters for the reinstatement of the death penalty. Amanda Gouws, distinguished professor of political science at Stellenbosch University, refers to a study by Dr. Johan Burger, senior researcher at the Institute for Security Studies (SA). From 1990 to 2017 there were 1938 murders on farms (of which 137 were farm workers). Of the victims, 88% were white and 12% black. If we look at the period 1991–2001 there were 6 122 farm attacks and 1 254 murders. Of the victims, 62% were white. 62 out of 800 000 farm dwellers are killed annually - that is 7,75 out of 100 000 while the national murder rate is 36 out of 100 000 citizens. Thus, although the incidence of farm murders is lower than murders in general, it is not an insignificant statistic. Farm attacks must be seen against the background of very high crime rates and general lawlessness in South Africa, Gouws reasons [19, 20]. But do these facts justify the reinstatement of the death penalty in order to ensure a more orderly society, as many people reason?

If it could be shown that the death penalty serves as a deterrent, there would be a case for it. But Ronald Preston’s arguments (late professor of social and pastoral Theology - University of Manchester) are in line with Van Niekerk, Van der Westhuizen, Amnesty International and others, namely that “exhaustive investigations in Europe and North America have shown that there is no such evidence, but rather that the number of murders varies little whether there is a death penalty or not” [21]. According to the Death Penalty Information Center (DPIC, Washington DC) “a survey of the former and present presidents of [America’s] top academic criminological societies, 88% of these experts rejected the notion that the death penalty acts as a deterrent to murder” [22]. Only 5% of them said “yes”, in other words were convinced that the death penalty acts as a deterrent, while 7% had no opinion [22]. This Center furthermore refers to a

*report by the National Research Council, titled Deterrence and the Death Penalty ... that studies claiming that the death penalty has a deterrent effect on murder rates are ‘fundamentally flawed’ and should not be used when making policy decisions (2012). A DPIC study of 30 years of FBI Uniform Crime Report homicide data found that the South has consistently had by far the highest murder rate. The South accounts for more than 80% of executions. The Northeast, which has fewer than 0.5% of all executions, has consistently had the lowest murder rate. [22]*

In the South the murder rate was 6 per 100 000 (2018) while in the Northeast it was 3.4 per 100 000 – noticeably less [22].

In fact, according to Stassen and Gushee, the death penalty has a paradoxical “imitative effect” on potential murderers: “It sets an official governmental example that killing someone is a proper way to resolve feelings of resentment and to slake the desire for revenge” [18]. The imitative effect according to them implies that after the government had executed someone in America, the number of murders in that area of the execution tends to increase, and the murder rates, as already indicated, are higher in states where the death penalty is still legal. When a nation goes to war, that government inevitably sends out the message that killing one’s enemies is acceptable. Murders within such a nation usually increase during these times. Among returning war veterans, there is a higher murder rate [18].

To impose the death penalty on someone is to say that such a person’s image as a human being has become so obscured that nothing can be done about his (or her) “salvation”, and that he therefore has no right to exist anymore. Is it ethical to impose such a judgement on someone? May one allow such a destructive verdict to be made about another person’s life? Of course, strict action must be taken against people who commit murder, especially where it took place premeditatedly and without extenuating circumstances, but, should one not place a much higher value on every human being’s life and try to protect it at all costs? Should we not overcome evil with good (to use a biblical metaphor)? Is rehabilitation and restorative justice, despite the costs involved, not more important and less costly than the eradication of life by the execution of the death penalty?

The Death Penalty Information Center provides the following facts to illustrate how costly the death penalty actually is:

*Oklahoma capital cases cost, on average, 3.2 times more than non-capital cases (Study prepared by Peter A. Collins, Matthew J. Hickman, and Robert C. Boruchowitz, with research support by Alexa D. O’Brien, for the Oklahoma Death Penalty Review Commission, 2017.) Defence costs for death penalty trials in Kansas averaged about \$400,000 per case, compared to \$100,000 per case when the death penalty was not sought (Kansas Judicial Council, 2014). A study in California revealed that the cost of the death penalty in the state has been over \$4 billion since 1978. The study considered pre-trial and trial costs, costs of automatic appeals and state habeas corpus petitions, costs of federal habeas corpus appeals, and costs of incarceration on death row (Alarcon & Mitchell, 2011). Enforcing the death penalty costs Florida \$51 million a year above what it would cost to punish all first-degree murderers with life in prison without parole. Based on the 44 executions Florida had carried out since 1976, that amounts to a cost of \$24 million for each execution (Palm Beach Post, January 4, 2000). The most comprehensive study in the country found that the death penalty costs North Carolina \$2.16 million per execution over the costs of sentencing murderers to life imprisonment. The majority of those costs occur at the trial level (Duke University, May 1993). In Texas, a death penalty case costs an average of \$2.3 million, about three times the cost of imprisoning someone in a single cell at the highest security level for 40 years (Dallas Morning News, March 8, 1992). [18]*

In South Africa, not only because of its current devastating poverty, huge unemployment, and income inequality – but also with its inhumane past of racial discrimination and how it has affected our judicial system including death sentencing, the death penalty should not be reconsidered. From the practice of slavery, when black people were considered the property of others, to this day, racial discrimination undoubtedly plays a role in the application of the death penalty. According to Stassen and Gushee “[r]ace is more likely to affect death sentencing than smoking

affects the likelihood of dying from heart disease” [23]. This is also confirmed by the following statistics from the Death Penalty Information Center [22]:

*Jurors in Washington state are three times more likely to recommend a death sentence for a black defendant than for a white defendant in a similar case (Prof. K. Beckett, Univ. of Washington, 2014). In Louisiana, the odds of a death sentence were 97% higher for those whose victim was white than for those whose victim was black (Pierce & Radelet, Louisiana Law Review, 2011). A study in California found that those convicted of killing whites were more than 3 times as likely to be sentenced to death as those convicted of killing blacks and more than 4 times more likely as those convicted of killing Latinos (Pierce & Radelet, Santa Clara Law Review, 2005). A comprehensive study of the death penalty in North Carolina found that the odds of receiving a death sentence rose by 3.5 times among those defendants whose victims were white (Prof. Jack Boger and Dr. Isaac Unah, University of North Carolina, 2001). In 96% of states where there have been reviews of race and the death penalty, there was a pattern of either race-of-victim or race-of-defendant discrimination, or both (Prof. Baldus report to the ABA, 1998).*

Another important reason why a country should stay away from the death penalty has to do with the fact, as already referred to, that too many people are sentenced to death innocently [22].

*Since 1973, more than 170 people [in the USA] have been released from death row with evidence of their innocence (Staff Report, House Judiciary Subcommittee on Civil & Constitutional Rights, 1993, with updates by DPIC). An average of 3.5 wrongly convicted death-row prisoners have been exonerated each year since 1973, peaking at 7.6 per year between 1999 and 2004.*

According to American researchers Liebman et al. [24]

*[n]ationally, the overall rate of serious reversible error in capital cases is 68% - nearly seven out of every ten cases ... The most common errors, prompting the most reversals at the state post-convictions stage, are (a) egregiously incompetent defence lawyers, mostly court appointed, who did not even look for – and demonstrably missed – important evidence that the defendant was innocent or did not deserve to die. 82% of those convictions overturned at the state level were found to deserve less than death when errors were corrected on re-trial; 7% were found innocent of the capital crime. Only 11% of those capital convictions reversed on state review were still found to deserve death on retrial ... These high error rates exist all over the nation. 24 states with the death penalty have overall error rates of 52% or higher. 22 of the states have overall error rates of 60% or higher. 15 states have error rates of 70% or higher ...*

This study concludes by stating that “the capital trial process is so error-ridden as to be not only unfair but also irrational” [24].

“To err is human, to forgive is divine” (this saying is from “An Essay on Criticism,” by Alexander Pope) [25]. We need more forgiveness, not only in South Africa, but across the world. I know that the pain associated with murder for the nearest relatives (on both sides) is unbearable, but forgiveness is an important component if we want to progress in our thinking beyond the death penalty. If you cannot forgive, you are killing your own spirit. Then you remain a victim. Forgiveness, on the other hand, brings liberation and healing. In South Africa there



are many gripping stories of forgiveness. One such story is about Ginn Fourie's 23-year-old daughter, Lindi, who died on New Year's Eve 1993 in the Helderberg Tavern (Western Cape, South Africa) bomb blast – still a turmoil political time in South Africa. She and some friends went for a drink when the bomb exploded, and Lindi lost her life. Lethlapa, PAC (Pan Africanist Congress of Azania) leader at that time, was responsible for these blasts. Long after this tragic happening, Ginn was driving in her car when she heard on the radio that Lethlapa (who received amnesty) was going to launch his book. She decided to attend the event. She met him and they began a journey together because of her forgiveness and his acceptance of her forgiveness. Since then, for many years, they have hosted seminars on forgiveness and reconciliation worldwide. Both were liberated by forgiveness [26].

We will have to transform the vicious cycles of murder, revenge and resentment with initiatives and actions that combat and cure its causes. "Forgiveness, depending on individual tolerance and level of wrong-doing, comes easier for some than it does for others. However, it is difficult to find a more selfless, modern-day message of forgiveness" [23] than that of former South African president, Nelson Mandela, who said: "Forgiveness liberates the soul, it removes fear. That's why it's such a powerful weapon" [27].

#### 4. Concluding remarks

For a criminal justice system to effectively deter criminals, competence, credibility, and effective communication are crucial. Such a system must be able to identify, arrest, prosecute, sentence, and rehabilitate most criminals. There is a certain chain of activities in a criminal justice system and the fight against crime. The whole system is just as strong as the weakest link in it. The fact that a criminal justice system warns potential offenders that they will be punished must be credible. The political will, especially among the country's leading politicians, must proclaim and achieve this in an urgent manner. These two important aspects need to be communicated effectively to all potential criminals. They need to know that the vast majority of offenders are not going to get away. South Africa is currently failing in all three these aspects. An effective criminal justice system, furthermore, must be coupled with restorative justice to effectively curb crime and murder. This can be done without the death penalty. The latter is based on revenge, but justice cannot be based on revenge. It must restore.

Punishment (excluding the death penalty) is important and needed for offences, but on its own it "is not effective in changing behaviour and is disruptive to community harmony and good relationships" [28].

*Exploring traditional African models of justice, one finds the Sotho practices of the 'lekhota'. If an offence is reported to a traditional leader, he may call a lekhota to session. The lekhota is normally attended by the victim, the offender, family members and support people ... of both the offender and the victim and community members. Anyone may however attend. Everyone attending enjoys full participation and all decisions are taken by consensus. The aim is to restore what has been lost through the offence. [28]*

This age-old African system with its restorative roots provides a stark contrast to our current criminal justice system which *inter alia* controls crime, while restorative justice places crime control largely in the hands of the community and Ubuntu. The current criminal justice system defines offender accountability as taking punishment, while restorative justice defines it as assuming responsibility and taking



action to repair harm. With restorative justice the offender is not defined by deficits as in the current criminal justice system, but by his/her capacity to make reparation. This process focusses on problem solving, emphasising dialogue and negotiation, as well as restitution as a means of restoring both parties (victim and offender) and to bring about reconciliation [28].

The death penalty is not only in total contrast to restorative justice, but also to the South African Bill of Rights, enshrined in our Constitution, which says: “Everyone has the right to life” (Chapter 2, Article 11) [9]. “Because of its basic importance, the right to life appears in virtually every international and regional human rights instrument ...” [6]. According to Hoexter, “the right to life” has an abstract character and is a very general concept. Therefore, it is “difficult to translate it into concrete terms or to give it specific meaning” [6]. Although important, it would be more realistic “to speak of a right not to be deprived of one’s life, and of corresponding duties on the government to take all the necessary steps to prevent untimely death” [6]. Interpreted, it means that the state should abolish the death penalty (where applicable) and never consider its reinstatement. We have seen that the death penalty does not help to uphold the right to life or serves as “an effective deterrent to other would-be murderers” [6].

Our Bill of Rights (Chapter 2, Article 12) further states that everyone has the right “not to be tortured in any way and not to be treated or punished in a cruel, inhuman or degrading way” [9]. According to Davis “a number of organisations and legal authorities have argued that the death penalty is a cruel and inhuman punishment” [4]. Amnesty International “argue that the death penalty, like torture, constitutes an extreme physical and mental assault on a person who has already been made helpless by government authority” [4]. The African Charter on Human and People’s Rights (Article 5) also contains a specific provision prohibiting “Torture and Cruel, Inhuman and Degrading Treatment” [29].

We must work hard in South Africa and globally to uphold a political climate in which politicians and courts maximise the protection of human rights, among others, these referred to above.


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